

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member finds the ALJ's Order should be affirmed.

As evidenced by the rather lengthy submission briefs filed by the parties, the facts surrounding this claim are numerous but largely not in dispute. Rather, it is patently obvious that the resolution of this claim turns upon the credibility of those testifying on each litigant's behalf.

Claimant testified that he sustained a work-related injury on September 23, 2007 when he fell through some rebar while working for respondent. It is worth noting that claimant's deposition testimony indicates that when he fell, he landed on his supervisor, "Jose".¹ The initial report from the hospital generally reiterates this mechanism of injury. But upon follow-up visits with the physician, Dr. McVay, there is some acknowledgment that claimant told at least one of respondent's representatives that his knee was injured when he was kicked by a horse. Claimant resides with his parents and his parents own a horse farm, maintaining as many as 100 horses at any given time.

All of respondent's witnesses deny any knowledge of an accident involving claimant occurring on September 23, 2007. Although there was some confusion by supervisor, Jorge Escobar, as to whether claimant was on the job on that day, the documents make it clear that claimant was on the work site and was apparently assigned to help clean up the project at the time he alleges he was injured, but Mr. Escobar may not have been claimant's direct supervisor on a regular basis. He was responsible for the employees working on this particular area of the site, including claimant. Nonetheless, Mr. Escobar, an individual who is known for being overly cautious, does not recall any fall involving claimant. More importantly, he denies any accident that involved claimant falling upon him.

The respondent's safety supervisor, Wallace West, noticed claimant's limp on September 24, 2007, and testified that when he questioned claimant, claimant told him that he was kicked by a horse the previous weekend. At that point, claimant was told he had to get medical treatment and a physician's release before he would be allowed to continue working.

Claimant essentially argues that *none* of respondent's witnesses can be believed because this is a dangerous occupation and *someone* is bound to have been injured during the course of the project given the nature of the work and the number of employees involved. Therefore, respondent's contention that no one has been injured is less than credible, and his assertion that he was injured is credible. Claimant further argues that because he had no bruise on his knee he could not have been kicked by a horse. And that Jorge Escobar was his supervisor on September 23, 2007 and because Mr. Escobar denied that fact, his testimony is particularly unbelievable, and so claimant should be believed.

¹ "Jose" is, according to claimant, Jorge Escobar. Claimant's Depo. at 42.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.² “‘Burden of proof’ means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.”³

In this instance, the ultimate question turns upon the witnesses’ credibility. Where there is conflicting testimony, as in this case, credibility of the witnesses is important. Here, the ALJ had the opportunity to personally observe the claimant testify while the balance of the witnesses’ testimony was taken by deposition. In reviewing all the evidence contained within the record, the ALJ denied claimant’s request for benefits specifically concluding that claimant failed to establish that he suffered a work-related injury. In short, he believed respondent’s witnesses and their version of the events over that offered by claimant.

After considering the same evidence, this Board Member agrees with the ALJ. In sum, this Member is not persuaded by claimant’s arguments. While claimant’s counsel makes much of Mr. Escobar’s purportedly evasive testimony, this Board Member finds that he was credible. Claimant was not assigned to Mr. Escobar on a daily basis. But on this particular day, he was assigned to help with the clean up process. Thus, Mr. Escobar’s contention that he was not claimant’s supervisor is understandable. And the suggestion that due to the sheer number of employees and the type of employment that *someone* must have been injured and so it is likely that claimant was injured is less than persuasive.

Like the ALJ, this Board Member is not persuaded that claimant sustained an accident arising out of and in the course of his employment on September 23, 2007. Accordingly, the ALJ’s preliminary hearing Order is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.⁴ Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge John D. Clark dated January 28, 2008, is affirmed.

² K.S.A. 2007 Supp. 44-501(a).

³ K.S.A. 2007 Supp. 44-508(g).

⁴ K.S.A. 44-534a (Furse 2000).

IT IS SO ORDERED.

Dated this _____ day of April 2008.

JULIE A.N. SAMPLE
BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
D. Steven Marsh, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge